

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NADINE HAYS,) CASE NO. CV 12-10219-DMG (PJW)
Plaintiff,)
v.) FINAL REPORT AND RECOMMENDATION
LOS ANGELES POLICE DEPARTMENT,) RE: PLAINTIFF'S MOTION FOR
et al.,) SUMMARY ADJUDICATION (DOC NO. 94)
Defendants.)

This Final Report and Recommendation is submitted to the Hon. Dolly M. Gee, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California. For the reasons discussed below, it is recommended that Plaintiff's Motion for Summary Adjudication be denied and that Defendants be granted summary judgment on the issue of whether there was probable cause to arrest Plaintiff on April 25, 2012.¹

¹ This Final Report and Recommendation has been issued to address arguments raised by Plaintiff in her Objections to the original Report and Recommendation.

1 I.
2

3 SUMMARY OF FACTS
4

5 On March 8, 2012, Plaintiff attended the Los Angeles Art Walk, a
6 monthly outdoor food and art festival. (Hays Decl. at ¶¶ 4, 9; Frank
7 Decl. at ¶ 2.) Plaintiff, who was a member of the "Occupy Movement,"
8 intended to perform what she calls an "educational road show" with her
9 friend Donald Kronos, in which they inform attendees about important
10 issues of the day. (Hays Decl. at ¶¶ 4, 9.) To facilitate her
11 efforts, she brought a wheeled cart loaded with an amplifier, a
12 computer, a plasma TV screen, candy to hand out to passers-by, and
13 informational handouts. (Hays Decl. at ¶ 5.)

14 After Plaintiff set up her equipment, she was approached by
15 Defendant Los Angeles Police Captain Horace Frank. (Compl. at ¶ 53;
16 Hays Decl. at ¶¶ 9-10; Frank Decl. at ¶ 3.) Frank issued Plaintiff a
17 citation for violating Los Angeles Municipal Code § 56.11, which makes
18 it a crime to leave "merchandise, baggage or any article of personal
19 property upon any parkway or sidewalk." (Hays Decl. at ¶¶ 10-12;
20 Frank Decl. at ¶¶ 4-5; Los Angeles Municipal Code § 56.11.)

21 Six weeks later, on April 25, 2012, Plaintiff and Kronos returned
22 to downtown Los Angeles with their equipment to perform their
23 educational road show. Plaintiff began speaking to passersby through
24 the amplifier while Kronos filmed the scene. (Hays Decl. at ¶¶ 19-21;
25 Plaintiff's Motion, Exhs. 5-8, Digital Recordings from April 25,
26 2012.) Officers Walker and Echavarria told her that she had to move.
27 (Hays Decl. at ¶¶ 19-20.) Plaintiff failed to move and began taunting
28 the officers. (Hays Decl. at ¶ 20; Plaintiff's Motion, Exhs. 5-8.) She
then began wheeling her cart down the street, continuing her
monologue as she traversed the block, and, eventually, wheeled it back

1 to where she started. (Hays Decl. at ¶ 21; Plaintiff's Motion, Exhs.
2 5-8.) Once there, she parked her cart on the sidewalk, all the time
3 speaking through her sound system. (Plaintiff's Motion, Exhs. 5-8.)
4 Officers then arrested her for using amplified sound. (Hays Decl. at
5 ¶¶ 22-24; Plaintiff's Motion, Exhs. 5-8.)

6 II.

7 ANALYSIS

8 Plaintiff brought this action against the Los Angeles Police
9 Department, Captain Frank, Officer Echavarria, and others under 42
10 U.S.C. § 1983, alleging that they violated her constitutional rights
11 when they falsely detained, arrested, and imprisoned her on March 8,
12 2012, and April 25, 2012. (Complaint at 23.) She now moves for
13 summary adjudication, asking the Court to rule on "whether Plaintiff's
14 two arrests were legally done or if they were done without probable
15 cause."² (Motion at 2.)

16 A. Standard of Review

17 Under Federal Rule of Civil Procedure 56, summary judgment, or,
18 in this case, partial summary judgment, is warranted if there is no
19 genuine dispute as to any material fact and the moving party is

20
21 ² In her Complaint, Plaintiff alleges that Defendants violated
22 her Fifth and Fourteenth Amendment due process rights. (Complaint at
23.) In her Motion, however, she claims that they violated her Fourth
24 Amendment rights against unreasonable searches and seizures. (Motion
25 at 15.) The detention and false arrest claims may not be raised under
26 the due process clause of either the Fifth or Fourteenth Amendments.
27 See *Albright v. Oliver*, 510 U.S. 266 (1994) (rejecting claim arrest
28 and prosecution without probable cause violated substantive due
process rights and holding claim must be evaluated under the Fourth
Amendment); *Bingue v. Prunchak*, 512 F.3d 1169, 1174 (9th Cir. 2008)
(holding driver and passenger struck by police cruiser chasing suspect
may not bring action under Fifth Amendment due process clause because
it only applies to federal actors). For that reason, the Court will
analyze these claims under the Fourth Amendment.

1 entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*,
2 477 U.S. 317, 322-23 (1986). A "genuine issue" exists if there is a
3 sufficient evidentiary basis upon which a reasonable jury could find
4 for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
5 242, 248-49 (1986). A factual dispute is "material" if it might
6 affect the outcome of the suit under governing law. *Id.* at 248. In
7 ruling on a motion for summary judgment, the Court views the
8 inferences it draws from the underlying facts in a light most
9 favorable to the party opposing the motion. See *Matsushita Elec.*
10 *Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

11 A party seeking summary judgment bears the initial burden of
12 informing the district court of the basis for the motion and
13 identifying those portions of the affidavits, pleadings, depositions,
14 answers to interrogatories, and admissions on file, which it believes
15 demonstrate the absence of a genuine issue of material fact. *Celotex*,
16 477 U.S. at 323. Where the moving party fails to do so, the opposing
17 party need not come forward with evidence to counter the motion.
18 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161 (1970).

19 B. The March 8, 2012 Incident

20 On March 8, 2012, Plaintiff was cited and arrested for leaving
21 her cart on the sidewalk. Plaintiff claims that Defendant Frank did
22 not have probable cause to arrest her. For the reasons explained
23 below, the Court concludes that Plaintiff has failed to establish that
24 Frank did not have probable cause.³

25 _____

26 ³ It is not clear to the Court whether Plaintiff was arrested on
27 March 8, 2012, or merely issued a citation. In her declaration, she
28 claims that Defendant Frank only cited her that day but explains that
she "later found out that [the citation] was actually classified as an
arrest." (Hays Decl. at ¶ 12.) In Captain Frank's report, which

1 Generally speaking, the Fourth Amendment prohibits a police
2 officer from arresting someone unless there is probable cause to
3 believe that the suspect has committed a crime. Const. Amend. IV.
4 Probable cause exists where, under the totality of the circumstances
5 known to the arresting officer, a prudent person would believe that
6 the suspect committed a crime as that crime is defined under the law.
7 *Lacey v. Maricopa County*, 649 F.3d 1118, 1131 (9th Cir. 2011), citing
8 *Dubner v. City and County of San Francisco*, 266 F.3d 959, 966 (9th
9 Cir. 2001); *Peschel v. City of Missoula*, 686 F. Supp. 2d 1107, 1118
10 (D. Mont. 2009). Said another way, if there is a "fair probability"
11 that a suspect has committed a crime, a police officer has probable
12 cause to arrest him. *Tatum v. City and County of San Francisco*, 441
13 F.3d 1090, 1094 (9th Cir. 2006)

14 Plaintiff was cited and arrested for violating Los Angeles
15 Municipal Code § 56.11. This section makes it illegal to "leave or
16 permit to remain any merchandise, baggage or any article of personal
17 property upon any parkway or sidewalk." Plaintiff allowed her cart to
18 remain on the sidewalk on March 8, 2012, even after being told by
19 police to move it. As such, police had probable cause to arrest her.

20 Plaintiff disagrees. She seems to think that this ordinance only
21 applies to vendors and points out that she was not selling anything
22 that night and had not placed any merchandise on the sidewalk.
23 (Complaint at 23; Hays Decl. at ¶ 10.) Plaintiff's interpretation of

24
25 Plaintiff submits as an exhibit to her Motion, he states that he
26 arrested her then issued her a citation and released her. But in his
27 declaration in opposition to the Motion, he states that he issued her
28 a citation. (Motion at Exh. 2; Frank Decl. at ¶¶ 4-5.) The Court
will assume for purposes of this Motion that Plaintiff was arrested
that night.

1 the ordinance is misplaced. On its face it is not limited to vendors
2 or to merchandise.

3 Further, to the extent that Plaintiff believes that the ordinance
4 did not apply to her because her cart was on wheels and, therefore,
5 was moveable, that argument, too, is rejected. The statute is not
6 limited to carts without wheels. Clearly, it applies to carts (and
7 other things) with wheels as well as those without. The obvious
8 purpose of the ordinance is to prevent people from obstructing the
9 sidewalks. The fact that the obstruction can be more easily moved
10 when it is on wheels than when it is not does not shield the owner
11 from the reach of the law.

12 Plaintiff contends that police were attempting to silence her for
13 her political activities and that they were selectively enforcing this
14 ordinance against her. Assuming that this is true, it does not help
15 her cause. The officers' motivations are irrelevant in a probable
16 cause analysis. *Lacey*, 649 F.3d at 1132 (noting arresting officers'
17 intent or motivation is irrelevant to probable cause analysis); *Tatum*,
18 441 F.3d at 1094 ("If the facts known to an arresting officer are
19 sufficient to create probable cause, the arrest is lawful, regardless
20 of the officer's subjective reasons for it.").

21 If, as Defendants assert, Plaintiff parked her cart on the
22 sidewalk (and refused to move it when told to by police), she violated
23 section 56.11 and police had probable cause to arrest her. But, for
24 purposes of this Motion, the Court only concludes that she has not
25 carried her burden of establishing that they did not have probable
26
27
28

1 cause to arrest her. For that reason, her Motion for summary
2 adjudication on this issue is denied.⁴

3 C. The April 25, 2012 Arrest

4 Plaintiff was arrested on April 25, 2012, for using amplified
5 sound. She argues that Defendant officers did not have probable cause
6 to arrest her because the ordinance barring amplified sound did not
7 apply to what she was doing. (Complaint at 23; Motion at 14.)
8 Defendants disagree. They contend that the law forbids the use of
9 amplified sound and that they were justified in arresting her when she
10 refused to stop using it. (Opposition at 5.) For the following
11 reasons, the Court sides with Defendants, concluding that, not only is
12 Plaintiff not entitled to summary judgment, but, with respect to the
13 issue of probable cause for her arrest that day, Defendants are.

14 Los Angeles Municipal Code § 41.57, provides:

15 It is unlawful for any person to cause, allow or permit the
16 emission or transmission of any loud or raucous noise from
17 any sound making or sound amplifying device in his
18 possession or under his control. (sic) (1) upon any private
19 property, or (2) upon any public street alley, sidewalk or
20 thoroughfare, or (3) in or upon any public park or other
21 public place or property.

22 Plaintiff admits that she was "talking to the public with [her]
23 amplified sound" shortly before she was arrested. (Hays Decl. at

24
25 ⁴ The videos Plaintiff submitted with her Motion capture this
26 arrest but they are too dark to see what happened that night. (Motion
27 at Exh. 4.) Had they been brighter, it is likely that the Court would
28 have granted Defendants summary judgment as to this arrest. See,
e.g., *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311-12 (9th Cir. 1982)
(explaining court can sua sponte grant summary judgment to the non-
moving party when warranted by the record).

1 ¶¶ 19-24.) Furthermore, she attached as an exhibit a video recording
2 of the incident, which clearly shows her standing on the sidewalk and
3 speaking through a microphone that is connected to an amplifier, which
4 is loudly amplifying her voice. (Motion at Exh. 6.) The video shows
5 the police arriving and explaining to her that she has to leave, and
6 that, if she fails to, she will be arrested. (Motion at Exh. 6.)
7 Plaintiff can be seen ignoring the officers' commands and taunting
8 them through the amplifier. (Motion at Exh. 6.) Plaintiff can then
9 be seen walking down the street, pulling her cart with her amplifier
10 on it, and speaking through the microphone. (Motion at Exh. 6.)
11 Plaintiff appears to walk almost to the end of the block, a distance
12 of likely more than 75 feet, still speaking into the sound system, and
13 can still be heard from where she walked away from the officers.
14 (Motion at Exh. 6.)

15 Thus, what is patently clear from Plaintiff's evidence is that
16 she violated the amplified sound ordinance and police had probable
17 cause to arrest her for violating that law. As such, the Court denies
18 Plaintiff's Motion for Summary Adjudication on this issue and grants
19 summary adjudication to Defendants. See *Watts v. U.S.*, 703 F.2d 346,
20 347 (9th Cir. 1983); *Cool Fuel, Inc.*, 685 F.2d at 311-12 (noting, if a
21 party moves for summary judgment and it is clear from the pleadings
22 that there is no genuine dispute with respect to a material fact and
23 the case cannot be proved at trial, the court may *sua sponte* grant
24 summary judgment to the non-moving party).

25 Plaintiff argues that she had already turned off the amplifier
26 when the officers arrested her. (Hays Decl. at ¶ 25.) This is not
27 clear from the video. But, even if it was, it is irrelevant. The
28 officers were free to arrest her at any time after she used the system

1 to amplify her voice in violation of the law. There was no time limit
2 for them to do so. The fact that they may have waited to arrest her
3 does not render her arrest unlawful.

4 In her Objections to the Report and Recommendation, Plaintiff
5 contends that she was also seeking summary adjudication on the
6 constitutionality of the amplified sound ordinance. The Court rejects
7 this argument. Plaintiff made clear in statements to the Court before
8 filing the Motion that she sought resolution only on the issue of
9 probable cause. As she explained on more than one occasion, if the
10 Court found that there was probable cause, she was inclined to drop
11 her lawsuit because it was creating friction with her husband.
12 (Motion at 2.) In her Motion, she noted that this friction had
13 "spurred Plaintiff to ask for the Court to make a ruling as to whether
14 Plaintiff's arrests were made without probable cause." (Motion at 2.)
15 She explained that, "If the Court rules that the arrests were
16 justified, Plaintiff will have no justification to proceed with this
17 lawsuit." (Motion at 2.)

18 After receiving the Report and Recommendation containing the
19 Court's finding that there was probable cause for her arrest,
20 Plaintiff shifted gears, arguing in her Objections that she was also
21 seeking a ruling on the constitutionality of the amplified sound
22 ordinance. It is too late to make that argument now. Plaintiff never
23 argued in the Motion that the ordinance was unconstitutional or ask
24 the Court to rule on whether it was. For that reason, Defendants
25 never addressed it in their brief. Nor did the Court in the original
26 Report and Recommendation. Her request that the Court take up the
27 issue in the now without any briefing is denied. Plaintiff may bring
28

1 a separate motion challenging the constitutionality of the ordinance
2 if she sees fit.⁵

3 D. Plaintiff's Other Objections to the Report and Recommendation

4 Plaintiff complains that she did not get notice of the motion
5 hearing date and, therefore, did not have the chance to argue her
6 positions at the hearing. (Objections at 3.) This objection is
7 overruled. The Court sent her a minute order two months before the
8 hearing notifying her of the time and date of the hearing. (Doc. No.
9 113.) Assuming that she did not receive it, she should have checked
10 the docket or called the clerk to determine when her Motion was being
11 heard. This is particularly true since the hearing was held three
12 months after she filed the Motion.

13 Further, the Court does not find that she has suffered any
14 prejudice as a result of missing the hearing. Defendants' counsel
15 merely submitted on the tentative when Plaintiff failed to appear and
16 whatever Plaintiff could have or would have said at the hearing she
17 has been able to say in her filings since the hearing, including in
18 her Objections.

19 Plaintiff contends that the Court unfairly denied her request for
20 additional time to file a reply brief despite the fact that it granted
21

22

23

24 ⁵ Even assuming that the Court were to conclude that the
25 ordinance was unconstitutional, it would also have to conclude that
26 the officers were entitled to qualified immunity because it appears
27 from the face of the ordinance that it is constitutional and,
28 therefore, the officers are shielded from suit for enforcing it, even
if it is later determined to be unconstitutional. See *Acosta v. City
of Costa Mesa*, 718 F.3d 800, 823-24 (9th Cir. 2013) (holding officers
entitled to qualified immunity for arrest pursuant to ordinance that
is later determined to be unconstitutional).

1 Defendants' request for additional time to file an opposition.
2 (Objections at 5.) There is no merit to this argument.

3 The Court denied Plaintiff's request for an extension because it
4 came after the Court had issued its tentative decision and after the
5 hearing on the Motion was over. Further, after the Report and
6 Recommendation was issued, Plaintiff filed Objections, which included
7 her arguments regarding the Motion and to which she improperly
8 attached her Reply brief anyway. The Court has drafted this Final
9 Report and Recommendation with those arguments in mind. Thus,
10 Plaintiff has not been prejudiced by the Court's failure to grant her
11 request to file her Reply brief after the Court released its tentative
12 decision and held a hearing on the Motion.

13 III.

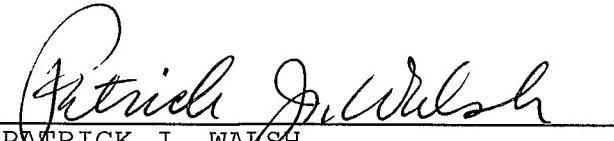
14 RECOMMENDATION

15 For the foregoing reasons, IT IS RECOMMENDED that the Court
16 issue an Order: (1) accepting this Final Report and Recommendation;
17 (2) denying Plaintiff's Motion for Summary Adjudication on the March
18
19
20
21
22
23
24
25
26
27
28

1 8, 2012 arrest; and (3) granting summary adjudication to Defendants on
2 the issue of whether they had probable cause to arrest her on April
3 25, 2012.

4

5 DATED: December 22, 2014

6 
7 PATRICK J. WALSH
8 UNITED STATES MAGISTRATE JUDGE

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28 S:\PJW\Cases-Civil Rights\HAYS 12-10219\Hays Final RR on MSA.wpd